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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1561

CHULA VISTA ELECTRIC COMPANY, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,

Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division One

MOTION TO DISMISS OR AFFIRM

EVELLE J. YOUNGER,
Attorney General,

ERNEST P. GOODMAN,
Assistant Attorney General,

PHILIP C. GRIFFIN,
Deputy Attorney General,

3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,

Attorneys for Appellee
State Board of Equalization.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division One

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or to affirm the judgment of the Court of Appeal, Second Appellate District of the State of California.

There is no substantial federal question presented as a basis of jurisdiction in the Court inasmuch as (1) the questions were not properly raised in the California courts and not decided in the California courts despite a belated attempt to raise the second issue claiming discrimination against United States contractors for the first time in a petition for rehearing in the California Court of Appeal which was denied without an opinion and again in a petition for hearing

in the California Supreme Court which was also denied without an opinion and (2) the questions have been foreclosed by previous decisions of this Court.

The decision of the California Court of Appeal does not deal with the questions because they were not raised in the trial court or on appeal. In any event, under the rule of this Court in the case of *Alabama v. King & Boozer,* 314 U.S. 1 (1941), the California *use* tax was properly asserted against the taxpayer herein based upon the consumption of tangible personal property in the performance of a lump-sum construction contract for the United States. The contractor-taxpayer in this case was the purchaser and the tax was imposed on him as such, *not* on the United States. Therefore, under *Alabama v. King & Boozer,* the tax did not violate the sovereign immunity of the United States. The cases of *Diamond National Corporation v. State Board of Equalization* and *Crocker-Citizens National Bank v. State Board of Equalization,* consolidated in Case No. 75-1038 decided April 19, 1976; *First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339 (1968) and *United States v. Tax Commission of Mississippi,* 421 U.S. 599 (1975) do not require a contrary result because in those cases a United States instrumentality was the purchaser from whom sales tax was collected. Since 1941, this Honorable Court has upheld state sales and use tax on contractors doing business with the United States even as to cost-plus contracts even though the terms of the contracts force their payment out of the federal treasury because the legal incidence of the tax is on the contractor, not the government. This is the exact factual situation presented in this appeal. California taxes the sale of tangible personal

property to contractors for use in the performance of construction contracts where the property consists of materials such as cable as was installed in this case on the Navy's North Island Air Station. The sales tax is imposed on the retailer who sells to the contractor. Rev. & Tax. Code § 6051. The retailer may collect reimbursement from the contractor if he chooses to do so and the contractor consents. Rev. & Tax. Code § 6052. If the contractor chooses to give a resale certificate instead of paying sales tax reimbursement and later uses the property in the performance of a contract for construction, he must pay use tax. Rev. & Tax. Code §§ 6094 and 6201. In this case, appellant either gave a resale certificate to the retailer of the cable or otherwise purchased the cable ex-tax and used the cable in the performance of a contract with the United States for the improvement of real property in California. Under section 6384 of the Rev. & Tax. Code all tangible personal property sold to contractors for such a use is subject to tax on the sale to the contractor. The Board collected use tax and appellant claimed a refund.

There is a category of tangible personal property which is not taxed when sold to a contractor for resale to the United States called "machinery and equipment" which is usually involved in a construction contract but never becomes an improvement to real property. Such property is tax exempt when sold to the United States under section 6381 of the Revenue and Taxation Code and former Regulation 1615 of the California Administrative Code. *See:* pages A-6 through A-8 of Appellant's Jurisdictional Statement. Appellant based its appeal on this state law. Appellant's principal contention was that the cable was "machinery and

equipment" but the Court of Appeal held that the cable was instead a "fixture" as defined in Regulation 1615, purchased for use in construction of an improvement to land. The validity of section 6384 and Regulation 1615 was not raised in the Court of Appeal until appellant failed to come within its terms at which time appellant petitioned for rehearing claiming section 6384 and Regulation 1615 were invalid. This argument was not heard. The petition was denied and the Supreme Court denied a hearing.

Appellant relies upon an erroneous construction of the California Sales and Use Tax Law and cases that are inapposite to reach a conclusion that is totally unsound under both California and federal law. At page 8 of Appellant's Jurisdictional Statement it is contended that sections 6007.5 and 6384 of the Revenue and Taxation Code create a sales tax on contractors who in doing business with the United States would collect from the United States so that the incidence of the tax would be on the United States. The plain language of the sections contradicts such a construction and Regulations 1521 (*See* pages A-2 through A-4 of Appellant's Jurisdictional Statement) and 1615 plainly indicate that the sales tax is imposed on the supplier of the contractor and a use tax is imposed on the contractor who fails to pay the tax to his supplier and then uses the property in the performance of a construction contract. The same rule applies to all contractors, not just United States Contractors who install electrical cable on land. Sections 6007.5 and 6384 of the Revenue and Taxation Code do not go beyond the holding of the *Alabama v. King & Boozer* case. Section 6384 treats United States contractors as

consumers, that is, purchasers at retail as are all contractors in California with respect to electrical cable which they install. Thus, sales tax is imposed on their suppliers as retailers. This is the settled law of California and no state or federal court has ever ruled to the contrary. The recent cases relied upon by appellant are inapposite because under those decisions the incidence of tax is on the United States or its instrumentality as the purchaser. But, in this case the purchaser is the contractor, not the United States.

In an attempt to make it appear that there is a substantial federal question appellant complains that to tax the contractor for his purchase that he uses after giving a resale certificate somehow discriminates against the United States or contractors with whom it deals. In the first place, this issue was not properly raised in the state courts and was not even discussed by the court below.

Secondly, the great bulk of the argument is directed to the treatment of "fixtures" sold by contractors but the cable here was not a "fixture" under Regulation 1521 as it read then or reads now, but rather a "material." *See* pages A-2 through A-3 of Appellant's Jurisdictional Statement.

The Court of Appeal held that the cable was not "machinery and equipment" under Regulation 1615 but rather a "fixture" as defined in that regulation. Regulation 1615 only defined "fixtures" to differentiate them from "machinery and equipment." The definition was too broad and has, since this case was decided, been eliminated by repeal of Regulation 1615. The remaining portions of Regulation 1615 have been incorporated into new Regulation 1521. As to cable

which is classified as "material" all contractors are treated alike and appellant has no grounds for complaint in this case.

In any event, there is no discrimination against the United States nor against contractors with the United States. The tax imposed by reason of section 6384 on government contractors is generally not as great as that imposed on private contractors. The Board, in Regulation 1521, has always provided that contractors are retailers of "fixtures," that is tangible personal property that is accessory to a building when installed. The Board in former Regulation 1615 and new Regulation 1521 has provided that *all* tangible personal property including accessory tangible personal property installed by *government* contractors is purchased by them for consumption in the performance of their government contracts and is therefore taxed on the basis of the purchase price paid for the tangible personal property and not the price charged to the federal government. Therefore, when it comes to property which is accessory to a building, government contractors pay less tax than private contractors. Hence there is no unconstitutional burden on the contractor dealing with the United States government but in fact favorable treatment of the government contractor.

This same question was presented by counsel for appellant in the case of *C. R. Fedrick, Inc. v. State Board of Equalization, cert. denied,* 419 U.S. 1120 (1974). It is respectfully submitted that the opinion of the Court of Appeal correctly disposes of the only issue in the case, the application of former Regulation 1615 under section 6384. No substantial federal question has been raised because the questions were presented too late in the California courts and were not considered. Further, this Honorable Court has already decided the question of the incidence of the tax in United States contractor cases and denied certiorari on the issue of discrimination against United States contractors.

Questions Presented by Appellant

1. Whether sections 6007.5 and 6384 of the California Revenue and Taxation Code and Regulations 1521 and 1615 of Title 18 of the California Administrative Code violate the Federal Government's constitutional immunity from state taxation.

2. Whether sections 6007.5 and 6384 of the California Revenue and Taxation Code and Regulations 1521 and 1615 of Title 18 of the California Administrative Code unconstitutionally discriminate against the United States and its contractors.

Statement of Facts

Appellant is an electrical contractor installing wiring in construction projects. It does not manufacture wiring or electrical equipment but purchases the material used to perform its installation work. Appellant entered into a contract with the United States to remove approximately 1,200 feet of electrical cable from existing underground conduit at the North Island Air Station and to replace it with new cable. The contract required installation of 12,000 volt capacity cable from the power company's facility, called a meter and switching station, to a substation used to divide the cable inlet into a number of outlet cables leading to buildings, equipment, and motors at the air station. Both the meter and switching station and the substation were movable property.

Appellant, acting under the contract, removed the old cable then in the conduit. The cable was salvaged by the United States and sold for scrap. The new cable was drawn into the conduit at the meter and switching station, spliced at manholes, and taken to the substation. The cable lay in but was not attached to the conduit. It was connected to both the meter and switching station and the substation. Ninety-five percent of the power in the line was used to operate machinery at the air station, with the remainder used for general electrical purposes such as lighting.

The cable installed by appellant was acquired by it at a cost of $90,000 and no sales tax was paid on the purchase. *The State of California assessed a use tax measured by the $90,000 purchase price.* Appellant filed a timely claim for refund, the claim was denied, and taxpayer filed its action to recover the use tax assessed. The trial court found that the tax was properly assessed, and this appeal followed.

ARGUMENT

I

Appellant Is Precluded From Raising Constitutional Questions Not Properly Raised in the California Courts

It is apparent from the allegations in the complaint of appellant in the California trial court (Appendix A) and the Conclusions of Law of the trial court in California (Appendix B) that no question as to the constitutionality of the Sales and Use Tax Law of the State of California was raised as an issue or decided as one by the California trial court. There was no pleading in the complaint that a claim for refund had been filed on any other grounds than those set forth in the complaint. On appeal in the Court of Appeal appellant raised no question on the constitutionality of sections 6007.5 and 6384 or the regulations and has made no reference in its jurisdictional statement to having raised the question. Appellant relies solely upon a statement at page 451 of the opinion (Appendix p. E-9) describing the intent of section 6384 as a holding on the issue of the validity of that section. The language speaks for itself and is not a holding because the issue was not before the court nor does the language express an opinion as to the validity of the section. The first time the second issue was presented is found in a petition for rehearing. (Appendix C.) The Court of Appeal denied rehearing without considering the question. (See pp. F-1 through F-2 of Appellant's Jurisdictional Statement.) The Petition for Hearing in the California Supreme Court raised the second issue (Appendix D) and the Supreme Court denied hearing without consid-

ering the question. (See Appendix C of Appellant's Jurisdictional Statement.) Under California appellate procedure questions raised for the first time in a petition for rehearing cannot be urged for appellate review. *Sinclair v. Aquarius Electronics, Inc.*, 42 Cal. App. 3d 216, 229 (1974); *People ex rel. Dept. of Public Works v. Mascotti*, 206 Cal. App. 2d 772, 780 (1962). At no time has appellant ever raised the first question on this appeal in the California courts.

The procedure by which a taxpayer may bring suit in California to recover sales and use tax is governed solely by statute. Sections 6901 to 6902[1] require the filing of a claim for refund with the Board. The claim must be in writing and must state the *specific* grounds on which the claim is based. § 6904. Moreover, failure to properly file a claim with the Board within the time allowed by law constitutes a waiver of any demand against the state on account of the overpayment. §6902. Only after this claim for refund is denied or not acted upon can the taxpayer bring a suit in the courts of California against the Board *upon the grounds set forth in the claim.* §§ 6932 and 6933. This procedure is jurisdictional in nature. *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 293 (1941). In *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), this Honorable Court unequivocally held that the claim for refund *frames and restricts* the issues for litigation, and must set forth the specific grounds upon which the claim is founded. To the same effect is *King v. State Board of Equalization*, 22 Cal. App. 3d 1006, 1015 (1972).

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[1]All references are to the California Revenue and Taxation Code.

The Board strongly contends that, based upon the authority cited above, appellant is limited to the legal issues as alleged and set forth in its complaint. Certainly, petitioner is limited to the questions in issue on appeal and not issues that were raised by petitions for rehearing and hearing for the first time on appeal. *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958). Beyond question petitioner is limited to questions that were specifically dealt with by the Court of Appeal. *Standard Vacuum Oil Co. v. United States*, 339 U.S. 157, 160 (1949); *Edelman v. California*, 344 U.S. 357, 358-59 (1952) and *Beck v. Washington*, 369 U.S. 541, 549-54 (1962). Therefore, the Board submits that in this petition the only legal issues that petitioner may raise are those specifically set forth as grounds in its complaint or properly raised on appeal. We respectfully submit that none of the questions presented by the Jurisdictional Statement were properly raised or considered by the Court of Appeal of the State of California and that therefore petitioner has not raised any substantial federal question for consideration by this Honorable Court.

II

The California Use Tax Which Is Imposed on Contractors as Purchasers Doing Construction Business With the United States Places the Legal Incidence of the Tax on the Contractor and Not the United States

Appellant for the first time in this case contends that the incidence of the California sales tax on sales to United States contractors and the equivalent use tax on them falls upon the federal government. The Board strongly disagrees. The legal incidence of the

sales tax on retail suppliers of contractors is on the retail supplier under *California law* which is the applicable law where the United States or one of its instrumentalities is *not* the purchaser. The legal incidence of the use tax on the contractor is on the contractor and not upon the United States under California and federal law. In this case the Board has not imposed a sales tax on the transaction between appellant and the United States but rather a use tax on appellant by reason of the fact that the property was used or consumed in a construction contract. California law makes no provision that a use tax paid by a purchaser may be collected from the purchaser's customer. Appellant was the purchaser of the cable and could have paid sales tax reimbursement to its supplier because sales tax on the supplier would have been due had appellant not given a resale certificate. Under no circumstances was the United States the purchaser in the taxable transaction in this case. Therefore, California law as discussed below should be applied to this appeal. *Diamond National Corporation v. State Board of Equalization, supra.*

Section 6007.5 provides:

> "A sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State is a retail sale. The gross receipts from such a sale or the sales price of property so sold shall be included in the measure of the taxes imposed by this part."

Section 6384 provides:

> "Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State."

Regulation 1615 provides:

> "United States Contractors. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies and equipment) to contractors or subcontractors for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.
>
> "Tax does not apply to sales of 'machinery and equipment' to contractors or subcontractors." (Emphasis added.)

Regulation 1521 provides:

> "Contractors are consumers of *materials* used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors.

"If, however, in the case of a time and material contract, the contractor bills his customer an amount for 'sales tax' computed upon his marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he regards himself as selling the materials so billed, and tax will apply to the amount of the billing for materials.

"*Contractors are retailers of 'fixtures' which they furnish and install and tax applies to the retail selling price thereof;* which, in the case of lump sum construction contracts, is regarded as the cost price of the fixtures to the contractors. If the contractor is the manufacturer of the fixtures, the retail selling price thereof is the prevailing price at which similar fixtures in similar quantities ready for installation would be sold to contractors." (Emphasis added.)

Generally "materials" are those materials which are used in constructing buildings, whereas "fixtures" under Regulation 1521 are accessories to the buildings which are installed such as lighting, plumbing, heating, air conditioning, refrigeration, elevator and other equipment for use in the operation of the building itself as distinguished from an activity within the building.

It is clear under the holdings of the California appellate cases that appellant's suppliers would bear the legal incidence of the California sales tax and that its application to their gross receipts from sales to appellant would be valid. There is no evidence that appellant was an agent for the United States. Appellant

was taxed use tax on tangible personal property acquired ex-tax or on resale certificates. Therefore, even were appellant's contentions correct, the tax fell *not* on the United States but on appellant and was constitutional even under the contention that the California sales tax is on the purchaser, which of course, it is not under California law. *Alabama v. King & Boozer,* 314 U.S. 1(1941).

The California Supreme Court in *Western L. Co. v. State Bd. of Equalization,* 11 Cal. 2d 156, 162 (1938) said:

"The provisions of the act itself specifically are that the tax is laid upon and is a direct obligation of the retailer. Although the act furnishes the method by which the retailer may calculate reimbursement to himself by listing separately the amount of the tax from the sales price, *nevertheless section 8½ and other provisions of the act specially negative any intent of the legislature that the tax should be considered as a tax on the consumer.* In every case in which that question has arisen under the California Retail Sales Tax Act, the courts have uniformly and consistently recognized the legislative intent and adhered to the construction that the tax is upon the retailer and not upon the consumer. [Citations.]" (Emphasis added.) 11 Cal. 2d 156 at 162.

The court then went on to point out:

"The law contemplates the imposition of the fixed rate of the tax on the gross receipts, as defined by the act, and not on the individual sale of merchandise; and the provision for a book-

keeping method to compute the amount of the tax separately from the sales price does not alter this fact (Roth Drug, Inc. v. Johnson, supra, p. 738.) 'That in ultimate effect the fund out of which payment [of the tax] is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer.' (People v. Herbert's of Los Angeles, Inc., supra.)

"*As noted in Meyer Construction Co. v. Corbett, supra, the act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer.* Therefore when the question has been whether the tax is collectible on receipts from sales to municipalities with the state for use in governmental functions it has been held that the retailer must pay the tax. (Rio Grande Oil Co. v. Los Angeles, supra; Graham Brothers v. Los Angeles, supra.)" (Emphasis added.) 11 Cal. 2d 156 at 163.

The court, after pointing out that the purpose of separately stating the amount of sales tax reimbursement was designed to avoid including the amount of sales tax reimbursement in the measure of the tax, went on to state:

". . . *The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales.*" (Emphasis added.) 11 Cal. 2d 156 at 164.

This remains the California rule except for sales to the United States and its instrumentalities under the *Diamond National* case. Nor does the *Western L. Co.* case stand alone as establishing the construction by the California appellate courts of the California sales tax as a tax on the retailer and not on the purchaser. The California appellate courts have consistently held that as to the purchaser the amount added as sales tax reimbursement is only part of the purchase price. *De Aryan v. Akers,* 12 Cal. 2d 781, 786 (1939).

Appellant asserts that the government contractor is the taxpayer since section 6384 of the Revenue and Taxation Code appears in the exemption provisions. We hasten to point out, however, that section 6007.5 on the same subject appears among the tax provisions. This provision does not change the nature of the tax or the taxpayer. The "tax imposed under this part" refers to the sales tax and applies "to the gross receipts (of suppliers) from the sale of *any* tangible personal property to contractors . . . for use in the performance of contracts with the United States for the construction of improvements on or to real property." The tax is imposed on the sale to the contractor and forbids the use of a resale certificate by making the contractor the final consumer as are all contractors in California and throughout most of the country.

In reading the cases, it is clear that the line is clearly drawn between *Kern-Limerick v. Scurlock,* 347 U.S. 110 (1954), and *King & Boozer, supra.* The

most recent California citation of *King & Boozer* is in *City of Los Angeles v. A.E.C. Los Angeles,* 33 Cal. App. 3d 933 at 940, where the court states:

> "Thus the fact that a municipal tax is imposed in a fashion which permits its ultimate economic burden to be passed on to a higher governmentality unit does not invalidate it (see General Dynamic Corporation v. County of Los Angeles, 51 Cal. 2d 59, 63 [330 Pac.2d 794]; Kaiser Co. v. Reid, supra, 30 Cal. 2d 610; Alabama v. King and Boozer, 31 U.S. 1."

King & Boozer was also cited in *United States v. Mississippi Tax Commission, supra,* 421 U.S. 599, 610 (1975).

In summation, it is the Board's position that its interpretations of sections 6384 and 6007.5 are that the sale to the government contractor is the taxable retail sale, and not the sale by the contractor at the time the property is used in construction. No tax was required to be passed on and collected from the United States. No tax was collected from the United States. Therefore the legal incidence of the use tax in this case was not on the United States but rather on the contractor. None of the cases cited by appellant establish that *King & Boozer* is not the present law in this area.

III

Sections 6007.5 and 6384 of the California Revenue and Taxation Code and Sections 1521 and 1615 of the California Administrative Code Are Valid and Do Not Constitute an Invidious Discrimination Against the Federal Government and Its Contractors

Appellant contends that section 6384 and necessarily section 6007.5 of the California Revenue and Taxation Code and sections 1521 and 1615 of the California Administrative Code as interpreted and applied by the Court of Appeal are unconstitutional as constituting an invidious discrimination against the federal government and those with whom it deals contrary to the rule in *Phillips Chemical Co. v. Dumas Independent School District,* 361 U.S. 376 and *Moses Lake Homes, Inc. v. Grant County,* 365 U.S. 744.

Section 6384 is designed to tax suppliers of construction contractors for the United States so as to treat all contractors fairly and in line with sales taxation as it affects United States contractors throughout the country.

In actuality, appellant seeks to take advantage of the tax-exempt status of the United States to acquire building materials without paying sales tax as all other contractors in California must do. There is no discrimination against appellant or the United States but instead equal and sometimes favorable treatment. California has merely legislated to avert a manifest injustice by preventing the perversion of the tax immunity of the United States for the benefit of a business entity which was never the intention of the United States Constitution. A little history of the development of the statutes and the two regulations will demonstrate this point.

Following the enactment of the Retail Sales Tax Act, effective August 1, 1933, the original rule of the Board pertaining to contracts involving contractors was adopted by the Board in 1933 and designated as Ruling No. 11, Contractors and Subcontractors. This ruling later became Regulation 1521. Under the ruling, certain installation contractors were considered to be retailers rather than consumers of the equipment and components, and sales tax liability with respect thereto was measured by the fair retail price of the property exclusive of installation charges provided the charges were segregated in the records of the contractor. Otherwise, tax was payable on the full contract price. The purpose of the regulation was to prevent the taxation of nontaxable installation services by distinguishing between contractors primarily selling services and those primarily selling tangible personal property.

There was no change in the ruling with respect to such installations until April 21, 1937, when the wording of Ruling 11 was revised, but the basic application of the tax was unchanged. The installer continued to be regarded as the retailer of equipment, taxable on its fair retail price if segregated in his records from the installation charges.

On March 23, 1939, amendments to Ruling 11 included the use, for the first time, of the terms "materials" and "fixtures." Each term was defined, along with an illustrative, but not exclusive, list of the kinds of property included in each category. The ruling provided that contractors were consumers of "materials" and retailers of "fixtures." The measure of tax, with respect to "materials," was stated to be the gross receipts from the sale of the "materials" to the contractor.

The measure of tax with respect to "fixtures" was stated to be the "retail selling price" of the fixtures, which, in case the contractor

> "includes installation of fixtures in a contract, along with materials, labor, and other services, and, accordingly, does not invoice the selling price of the fixtures separately from the other items of the contract, the selling price of the fixtures shall be deemed to be the fair retail selling price of such fixtures, which shall not be less than the price at which similar fixtures, in similar quantities, would be sold to other contractors."

Subsequent amendments to Ruling 11 made no change in the application of the tax with respect to "materials" or "fixtures," except in the case of contracts with the United States. An amendment effective June 11, 1941, added the following paragraph:

> "Contractors are the consumers of tangible personal property (including materials, supplies, fixtures, and equipment) used in the performance of contracts with the United States for the construction of improvement to real property, and the tax applies to the gross receipts from the sale of such tangible personal property to the contractors."

This amendment *was required* to conform the ruling to section 5.3 of the Retail Sales Tax Act of 1933 (later renumbered as section 6384 of the Sales and Use Tax Law). This section became effective also June 11, 1941, the same date as the amendment to the ruling, and provided:

> "Notwithstanding any other provision of law the tax imposed under this act shall apply to the gross receipts from the sale of *any* tangible

personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property." (Emphasis added.)

Because the section provided that tax applies to the sale of *any* tangible personal property to contractors with the United States improving real property, it was necessary to provide in the ruling that such a contractor was the consumer not only of "materials," but of "fixtures" as well.

In 1943, effective July 11, the Retail Sales Tax Act of 1933 and the Use Tax Act of 1935 became part of the Revenue and Taxation Code, known and cited as the "Sales and Use Tax Law." Section 5.3 of the Retail Sales Tax Act became section 6384 of the Sales and Use Tax Law, and, effective July 1, 1943, Ruling 12 was adopted, entitled "United States Contractors," based upon section 6384, and superseding the paragraph added to Ruling 11 in 1941 relating to United States contractors. Ruling 12 later became Regulation 1615.

As noted in the history of the law and rulings, section 6384 *requires* a different application of tax with respect to "fixtures" sold to United States contractors, as compared to "fixtures" sold to other contractors.

The case of *General Electric Company v. State Board of Equalization,* 111 Cal. App. 2d 180, 191-92 (1952) specifically points to section 6384 as necessitating such "duality of treatment," in the following clear, unambiguous language at page 192:

"Rule 12 was made necessary by the specific provisions of the tax statute. Section 6381 of the Revenue and Taxation Code exempts from the sales tax gross receipts derived from the sale of tangible personal property to the United States. Section 6384 of that code, in order that the state shall collect some tax, requires that contractors shall be regarded as consumers. Unless they were so treated, contractors with the United States would pay no tax at all. This appears to be a reasonable basis for this classification between contractors."

The case of *Western L. Co. v. State Bd. of Equalization, supra,* 11 Cal. 2d 156 was decided in 1938, the year before section 6381 was enacted. At the time the case was decided, the only tax exemption in the law for sales to the United States was provided in section 5 of the 1933 Retail Sales Tax Act which exempted, "the gross receipts from sales of tangible personal property which this state is prohibited from taxing *under the Constitution or laws of the United States of America,* or under the *Constitution* of this *State.*" The *Western L. Co.* case held that under the Constitution of the United States and the State of California, a sales tax is not an unconstitutional tax upon a federal instrumentality unless it is imposed directly upon that federal instrumentality. The California sales tax is imposed on the retailer. Only reimbursement is collected from the purchaser. The following year in 1939, the Legislature enacted section 5.1 of the Retail Sales Act of 1933, which provided:

"There are hereby specifically exempted from the provisions of this act and from the computation of the amount of taxes levied, assessed or payable hereunder the gross receipts from the sale

of any tangible personal property to the United States or any agency or instrumentality thereof except a corporate agency or corporate instrumentality."

This act was an urgency measure and was explained as necessary because,

"Bids running into millions of dollars have been submitted by California firms to the Federal Government for contracts to supply necessary materials for Federal construction projects.

"All these bids were submitted upon the assumption that the Retail Sales Act of 1933 was inapplicable to receipts derived from sales to Federal instrumentalities. Recently however, the redefinition of the scope of state authority to tax Federal instrumentalities has made such receipts subject to that Act.

"Unless this Act goes into immediate effect, the firms which have submitted these bids will be compelled to withdraw them. bids submitted by firms in other States will be accepted instead, and the material well-being of the people of California will be definitely impaired and retarded."

This section, subsequently in 1941, became section 6381 of the Revenue and Taxation Code and obviously provides for an exemption from sales tax on a retailer when that retailer makes a sale to a federal instrumentality regardless of the lack of a constitutional exemption as decided in the *Western L. Co.* case. The *Diamond National* case has restored the constitutional immunity of the United States where sales are made to it.

Section 6384, upon which Regulation 1615 on United States contractors is based, precludes the use by contractors of the Constitutional exemption of the United States by taxing sales of *any* property to United States contractors to be used in performing construction contracts to improve real property. This has the effect of imposing tax upon sales of "fixtures" to United States contractors which through the ordinary operation of Regulation 1521 would be exempt as sales for resale to the United States. This section, as above explained, did in fact enlarge the tax base by applying the tax to sales to United States contractors of certain property, including "fixtures," that could otherwise have been exempt as sales for resale to the United States depending upon the contract with the United States.

Regulation 1615 merely implements section 6384 which taxes the sale of *all* tangible personal property to contractors when used in government land improvement contracts. Without section 6384 and Regulation 1615, contractors could set up their contracts to resell all materials and fixtures to the United States. Normally a contractor would prefer to be a consumer to keep the tax measure and hence the contract price down. In either case, section 6381 and under *Diamond National* the Constitution of the United States would exempt the transaction if the contractor invoiced materials and fixtures to the United States rather than charge a lump sum price.

Appellant dwells upon the definitions of "fixtures" in Regulations 1521 and 1615. It must be remembered as explained above that because of section 6384 there can be no different tax application between sales of "materials" and sales of "fixtures" to United States

government contractors. the only distinction drawn by Regulation 1615 is between "fixtures" and "machinery and equipment," the latter being considered personal property sold by the contractor to the United States, under certain conditions. These sales *are* tax exempt by express language in the regulation. The term "fixtures" is defined in differing terminology in the two regulations, and hence does not have the same meaning in both regulations. The purpose of the definition of a "fixture" in Regulation 1521 is to distinguish "fixtures" from "materials," that is why "materials" are defined as being combined with each other, integral and inseparable parts of the completed structure, whereas "fixtures" are defined as accessories and which do not lose their identity as accessories when placed or installed. The distinction sought in these definitions is that between those portions of the building which have become incorporated and inseparable from the completed structure and those portions which are clearly identifiable as *accessories* and removable after having been placed or installed.

The purpose of the definition of "fixtures" in Regulation 1615 is to distinguish "fixtures" which are taxable when purchased by a contractor because of their intended use as improvements to realty under section 6384 of the Revenue and Taxation Code from "machinery and equipment" which is not taxable in that such units are not a part of a structure on land. Consequently, fixtures are defined, "fixtures," as distinguished from "machinery and equipment," are things which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other

structure. The definition disregards the distinction between "materials" and "fixtures" so as to emphasize the distinction between "fixtures," and "machinery and equipment." The 1615 definition of "fixtures" presupposes the 1521 definition.

It should be noticed, however, that the word "inseparable" is left out of that definition. This leaves room for the distinction between "materials" and "fixtures." The purpose of the definition is merely to distinguish "fixtures" from "machinery and equipment" which are not a part of the structure nor accessory to the structure itself and which according to section 6384 of the Revenue and Taxation Code would not be taxable because they are not "improvements on or to real property to this State." Thus, there is no disparity between the two definitions because they have entirely different purposes. As noted above, the different tax treatment of "fixtures" in United States government and non-United States government contracts is necessitated by section 6384.

Actually, the definition of "fixtures" as used in Regulation 1615 describes property that would fall within the definition of "materials" in Regulation 1521 and in this case the cable is a good example because the Court of Appeal held that the cable was a "fixture" and not "machinery and equipment." This is consistent with the law, since section 6384 in legal effect wipes out the distinction between "materials" and "fixtures" insofar as sales to United States construction contractors is concerned. Appellant's analysis of the law is erroneous and therefore its conclusion is without any legal foundation.

In summary then, it is the statutory policy of the State of California under section 6381 of the Revenue and Taxation Code to exempt from sales taxation, sales to the United States or its instrumentalities. *Diamond National* has rendered this section superfluous. Under this section, in the absence of any other statute, contractors for United States government improvements to real property would not pay any sales tax on "materials" or "fixtures" used in such construction because under the law they could be purchasing for resale to the United States and would be exempted from tax. They would not have to pay sales tax reimbursement or use tax as the "materials" and "fixtures" would be purchased for resale. Inasmuch as the resale would be to the United States government, it would be tax exempted under section 6381 of the Revenue and Taxation Code and now under the United States Constitution. It is for this reason that the Legislature, in order to impose a limit on this statutory exemption, and now necessarily the constitutional one, enacted section 6384 to provide that contractors of the United States government make taxable purchases of the "materials" and "fixtures" which they use in the construction of improvements on or to real property in this state. Regulation 1615 is *required* by that statute. Therefore, Regulation 1615 alone cannot be held to be discriminatory against United States contractors. The authority cited by appellant is no answer, particularly in light of *General Electric* which upheld the regulation of the State Board of Equalization under section 6384 of the Revenue and Taxation Code.

Contractors both for the state and its political subdivision and the federal government are taxed as consumers of "materials" which become an integral and inseparable part of the completed structure and consequently are assessed identical taxes.

The facts are that if a construction contractor, performing a construction contract for the improvement of real property in this state for the United States government, purchased "materials" as defined in Regulation 1521 for such use, and the same contractor purchased identical materials for use in constructing a similar or identical building for a non-United States government customer, the tax would be imposed upon the same measure. A sales tax would be imposed on the retailer selling to the contractor in both instances. This is the exact situation we have in this case in the installation of the cable which is a "material" under California law.

Under section 6006 and Regulation 1521 all but United States contractors are retailers of "fixtures." This law, in fact, imposes a greater tax on the non-government contractor than a government contractor would bear in some cases because the government contractor is never treated as a retailer of tangible personal property in United States government contracts. He only pays sales tax reimbursement on his cost of purchase. The case in which the tax is greater on the private contractor is where a manufacturer of fixtures is also the installing contractor. Appellant

did not manufacture any of the property in this case and has no standing to complain. This is true because the manufacturing contractor must pay sales tax on the cost of the labor and overhead involved in the fabrication of any fixture. A government contractor would not have to pay such tax but would be deemed a consumer of the materials used in the manufacture of the fixture. It would appear that appellant's argument fails because of its reliance on *Moses Lake Homes v. Grant County,* 365 U.S. 744, 751 (1961), where it is stated:

> "If anything is settled in the law, it is that a State may not discriminate *against* the Federal Government or its lessees." (Emphasis added.)

In the Board's administration of the Sales and Use Tax Law the United States government construction contractor is certainly not discriminated *against* insofar as measure of tax is concerned. In fact, in the usual case, the United States government contractor pays less tax with respcet to a similar construction job for the improvement to real property because he is a consumer of fixtures rather than the retailer of them. A more accurate description of appellant's complaint is that the opportunity to manipulate a contract so as to avoid a fair tax by utilizing the exempt status of a customer has been thwarted. But section 6384 is a legitimate law that tries to equalize taxpayers in the same business.

Conclusion

Wherefore, appellee respectfully submits that the questions here involved are insubstantial and appellee respectfully moves the Court to dismiss the appeal. If the question appears to this Honorable Court to be clearly settled in appellee's favor, under the law appellee moves the Court, in the alternative, to affirm the judgment entered in the case by the California Court of Appeal.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

ERNEST P. GOODMAN,
Assistant Attorney General,

PHILIP C. GRIFFIN,
Deputy Attorney General,

By PHILIP C. GRIFFIN,

Attorneys for Appellee
State Board of Equalization.

APPENDIX A

Complaint for Refund of Sales and Use Taxes

In the Superior Court of the State of California, in and for the County of Los Angeles.

Chula Vista Electric Company, a corporation, Plaintiff, vs. The State Board of Equalization of the State of California, Defendant. No. 942737.

Filed: November 8, 1968.

I

Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California.

II

Defendant is, and at all times herein mentioned was, an agency of the State of California. This action is brought against defendant under the authority of Section 6933 of the California Revenue and Taxation Code.

III

California Sales and Use Tax was paid pursuant to rules of the California State Board of Equalization for the period October 1, 1964 to December 31, 1967 and erroneously included certain items upon which Sales and/or Use Taxes were paid erroneously, the particulars of which are set out in paragraphs IV through VI herein.

IV

On said payment of California Sales and Use Tax, plaintiff Chula Vista Electric Company erroneously included as taxable, certain items of machinery, equipment and personalty which were installed by plaintiff for

the use of and sale to the United States Government at various locations within the State of California and plaintiff erroneously paid Sales and Use Tax thereon.

V

On said payment of California Sales and Use Tax, plaintiff Chula Vista Electric Company erroneously included as taxable a measure of tax on certain items of machinery, equipment and personalty which were sold for resale by the plaintiff subsequent to October 1, 1964 and plaintiff erroneously paid Sales and Use Tax thereon.

VI

On said payment of California Sales and Use Tax, plaintiff Chula Vista Electric Company erroneously paid as taxable, tax on specific sales wherein the measure of tax used was computed in error on fabrication labor, material, services and separately-stated transportation charges.

VII

As a result of the erroneous payments of Sales and Use Taxes as aforesaid, plaintiff Chula Vista Electric Company overstated Sales and Use Taxes owing by it to the State Board of Equalization of the State of California for the period of October 1, 1964 to December 31, 1967 in the amount of $10,000.00.

VIII

A claim for refund of the amounts erroneously paid by the plaintiff Chula Vista Electric Company for the period commencing October 1, 1964 and ending December 31, 1967 was filed with defendant on or about February 29, 1968. A true copy of said claim for refund is attached hereto, marked Exhibit "A", and incorporated herein by reference.

IX

Said claim for refund was denied by defendant on August 6, 1968 and notice thereof mailed to plaintiff Chula Vista Electric Company on August 13, 1968.

WHEREFORE, plaintiff prays judgment:

1. For a refund of $10,000.00 for overpayment of tax; and
2. For interest of 6% from date of payment of tax, pursuant to Section 6936 of the California Revenue and Taxation Code.

DATED: November 8, 1968.

MAXWELL & SHEAHAN
By /s/ Daniel R. Sheahan
DANIEL R. SHEAHAN
Attorney for Plaintiff

APPENDIX B

Findings of Fact and Conclusions of Law

Superior Court of the State of California, for the County of Los Angeles.

Chula Vista Electric Company, corporation, Plaintiff, v. The State Board of Equalization of the State of California, Defendant. No. 942737.

Filed: June 3, 1974.

The above entitled matter came on regularly for trial on November 5, 1973, before the Honorable Delbert E. Wong, Judge Presiding. Plaintiff was represented by its attorney, Clyde R. Maxwell, and defendant was represented by its attorneys, Evelle J. Younger, Attorney General, Philip C. Griffin and Mark W. Jordan, Deputy Attorneys General. The court, having considered the evidence presented to it; and having read and considered the briefs filed by the parties; and being fully advised in the premises, hereby makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff is an electrical contractor, which obtained a contract to install electrical cable at the Naval Air Station in San Diego, California. The cable was installed in underground conduits, being attached at one end to a switching station which received 12000 volts from the power company, and at the other end to substations.

2. The cable transmitted the power it received through its length to the various substations and there

the power was distributed through the cable to the building or equipment it was meant to power.

3. At the substations, the main cable was broken down into six or seven cables through which the power was sent to buildings or equipment.

4. The sole purpose of the cable was to conduct electricity and carry power from one substation to another.

5. The cable is an integral part of an electrical distribution and transmission system.

6. This cable, once plaintiff had installed it as part of an electrical distribution or transmission system, became an improvement to real property.

7. Plaintiff consumed and used tangible personal property in the course of installing the cable which became an improvement of real property.

From the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

I

Transmission and distribution lines of the nature installed by plaintiff are real property or improvements thereto within the meaning of the sales and use tax law and the cable installed by plaintiff as part of a transmission or distribution line is therefore an improvement to real property.

II

Revenue and Taxation Code section 6016.5 classifies transmission and distribution lines of the nature installed by plaintiff as real property.

III

The cable installed by plaintiff was an improvement on or to real property within the meaning of Revenue and Taxation Code section 6384.

IV

Sales tax or use tax is due on the gross receipts or sales price on any tangible personal property used by a contractor in improving real property for the United States government.

V

Plaintiff's installation of the transmission line was done for the United States government. Tax was therefore due on the amount of gross receipts paid for the tangible personal property used by plaintiff in making the installation.

VI

Plaintiff is entitled to no refund of sales or use tax paid to defendant by reason of its use of tangible personal property in installing the transmission and distribution lines.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: JUNE 3, 1974.

/s/ Delbert E. Wong
DELBERT E. WONG
Judge Presiding

APPENDIX C

In the Court of Appeal, Second Appellate District, State of California, Division One.

Chula Vista Electric Company, a corporation, Plaintiff and Appellant, vs. The State Board of Equalization of the State of California, Defendant and Respondent.

APPELLANT'S PETITION FOR REHEARING

To the Presiding Justice and to the Associate Justices of the Court of Appeal of the State of California, Second Appellate District, Division One:

Appellant Chula Vista Electric Company petitions for a rehearing to reconsider the decision in this Court in this action filed on December 3, 1975.

II

THE OPINION IS IN ERROR IN HOLDING THAT THE ELECTRICAL INSTALLATIONS HERE IN QUESTION ARE "FIXTURES", BUT REFUSES TO PERMIT EXEMPTION FOR TAX AS A SALE TO A TAX EXEMPT ENTITY PURSUANT TO THE HOLDING OF THIS COURT IN *HONEYWELL INC. V. STATE BOARD OF EQUALIZATION* 48 CAL.APP. 3RD 897 AND *GENERAL ELECTRIC CO. V. STATE BOARD OF EQUALIZATION* (1952) 11 CAL.APP.2D 180.

The Court asserts in its opinion, on page 6, last line, that Chula Vista's installation is a fixture within the meaning of Title 18, Section 1615 of the Administrative Code. It would follow that if the item is described

as a fixture under Section 1615 it must also follow the same definition as a fixture set out in Section 1521, Title 18 of the Administrative Code. The Court further states that Appellant's reliance upon *Honeywell Inc. v. State Board of Equalization* 48 Cal.App.3rd 897 (122 Cal.Rep. 237) is misplaced. The attention of the Court is directed to a portion of the opinion in the *Honeywell* case (supra) which states as follows:

> "For over forty years it has been the law of California that when the manufacturer of tangible personal property sells such property at retail, such sale is subject to sales tax even though such manufacturer may also install such tangible personal property in real property, when such tangible personal property may be properly classified as 'fixtures'. When a manufacturer of a fixture contracts to sell and install the fixture, the problem is not a legal problem of taxability, it is merely an accounting problem to determine what portion of the total contract price is attributable to the tangible personal property (fixture) and what portion is attributable to the labor and service of installing it. If a retail merchant sells a portable air conditioner which is clearly subject to sales tax, such sale does not become nontaxable merely because the merchant delivers it to his customer's home and 'plugs' it into the electric outlet to make certain that it operates. But Honeywell in effect argues that this analogy is not accurate because in the case at bar *all* of its 'control devices' became a part of the realty and were not 'fixtures'. Board and the trial court, based on substantial evidence, found otherwise. . . ."

> ". . . What Honeywell is actually doing is questioning the validity of Board's basic approach of distinguishing between fixtures and materials which are incorporated in and become a permanent part of the real property. . . ."

In that case the Court cited the matter of *General Electric Company v. State Board of Equalization,* 11 Cal.App. 2nd 180, which held that a fixture installation was a sale of tangible personal property and in the instant matter such a sale would have resulted in Chula Vista having no liability for tax whatsoever. The attention of the Court is further directed to a reference relating to Section 6384 of the Revenue and Taxation Code. For purposes of this argument, the attention of this Court is directed to the plastic nature of State Board's actions which, if approved by this Court, would permit the State to recover a tax designed as reimbursable and not a burden on the seller from all persons other than those doing business with the United States Government. For the purposes of additional revenue the Board would impose a non-reimbursable tax on a person doing business with the United States Government solely because the United States Government is not subject to the imposition of an excise tax such as a state sales or use tax, and will not permit or pay a reimbursement to any person selling personal property to it irrespective as to whether the same is furnished in its tangible form or otherwise installed.

The attention of the Court is directed to a recent United States Supreme Court opinion, *Phillips Chemical*

Co. v. Dumas Independent School District, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed(2d) 384, which has condemned discrimination, saying at page 481 of the opinion as reported in the Supreme Court Reporter:

> "None of these arguments urged in support of the Texas Classification, seems adequate to justify what appears to be so substantial and transparent a discrimination against the Government and its lessees. Herein, Phillips is taxed under Article 5248 on the full value of the real property which it leases from the Federal Government, while businesses with similar leases using exempt property owned by the State and its political subdivisions, are not taxed on their leaseholds at all. The differences between the two classes, at least when the Government's interests are weighed in the balance, seem too impalpable to warrant such a gross differentiation. It follows that *Article 5248 as applied in this case, discriminates unconstitutionally against the United States and its lessee.* As we had occasion to state, quite recently, it still remains true, as it has from the time of *M'Culloch vs. Maryland,* 4 Wheat 316, 4 L.Ed. 579, that *a state tax may not discriminate against the Government or those with whom it deals.* (Citations) Therefore, this tax may not be exacted." (Emphases added.)

Treatment of all persons must be uniform and gross discrimination is present when any person is held liable for a tax only because he sells his property installed for the use of the United States Government.

APPENDIX D

Petition for Hearing

In the Supreme Court of the State of California.

Chula Vista Electric Company, a corporation, Plaintiff and Appellant, vs. The State Board of Equalization of the State of California, Defendant and Respondent. 2nd Civil No. 45454.

I
WHY A HEARING SHOULD BE GRANTED BY THIS COURT

A decision of this Honorable Court is essential in this case for the following reasons as authorized by Rule 29:

1. Important questions of law are involved herein, the settlement of which is essential. Specifically:

> (a) Section 6384 of the California Revenue and Taxation Code is unconstitutional because it discriminates against the United States Government and the persons with whom it deals in violation of the doctrine of federal sovereignty as implemented by Section 107 of Title IV of United States Code Annotated. It is contrary to the law established by the United States Supreme Court in the cases of *Phillips Chemical Co. vs. Dumas Independent School District* (1960), 361 U.S. 376, 80 S.Ct. 474, and *Moses Lake Homes, Inc. vs. Grant County* (1961), 365 U.S. 744, 81 S.Ct. 870.
>
> (b) Section 6384 of the California Revenue and Taxation Code and Section 1615 of the Cali-

fornia Administrative Code as interpreted and applied by the Court of Appeal are unconstitutional as constituting an invidious, arbitrary and capricious classification and discrimination against the federal government and those with whom it deals, contrary to the rule established in the cases of *Phillips Chemical Co. vs. Dumas Independent School District* and *Moses Lake Homes, Inc. vs. Grant County,* cited supra.

2. Section 6016.5 of the Revenue and Taxation Code is unconstitutionally vague and uncertain as to what is meant or intended to be included in an electrical transmission line or, alternatively, the Court of Appeal's holding that the cable installed by Petitioner is not exempt under Section 6016.5, contrary to law.